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No. 91-233

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES W. LAWRENCE, JR., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court may consider at sentencing conduct for which a defendant has been acquitted.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 18-32, is reported at 934 F.2d 868. The opinion of the district court, Pet. App. 33-46, is reported at 730 F. Supp. 1483.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1991. The petition for a writ of certiorari was filed on August 6, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioners Charles W. Lawrence, Jr., Joseph A. Bertucci, and Norah S. Bertucci were convicted on one count of conspiracy to defraud the United States by impeding the functions of the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371. Petitioners were also convicted of filing false corporate income tax returns, in violation of 26 U.S.C. 7206(1), and aiding and assisting in the preparation of false corporate returns, in violation of 26 U.S.C. 7206(2). Petitioners were acquitted on 14 counts relating to false partnership tax returns and false personal income tax returns, and petitioner Norah Bertucci was also acquitted on two counts involving false corporate returns. Pet. App. 20, 28.

The district court sentenced petitioner Charles Lawrence to 21 months in prison, three years of probation, and a fine of $25,671.44. Petitioner Joseph Bertucci was sentenced to two years' imprisonment, three years of probation, and a $40,671.44 fine. Petitioner Norah Bertucci was sentenced to 18 months in prison, three years of probation, and a fine of $30,671.44. Gov't C.A. Br. 5. The court of appeals affirmed.

1. In the early 1980's, petitioners owned and operated two adult bookstores in Wisconsin. In addition to selling merchandise, the stores operated video arcades featuring sexually explicit films. The stores had different methods for handling sales of merchandise over the counter and sales at the video arcade. Customers wishing to enter the video arcade were required to purchase tokens for use in a private viewing booth. Clerks kept bags of tokens at the

counter. The token sales were not rung up on the cash register and were not routinely entered on daily sales sheets. Petitioners deposited only a portion of the token sales receipts into the bookstores' corporate bank accounts, and for income tax purposes they informed their accountant of only the amounts deposited into those accounts. Pet. App. 18-19; Tr. 604, 607-608, 1526-1532, 1592-1595.

During the period July 31, 1983, through June 4, 1984, one of the bookstores received $35,388 in token income, which petitioners did not report on the corporate income tax returns. Tr. 1429-1434, 1528-1532. During the period from August 23, 1983, to December 30, 1984, the other bookstore received $16,615 in token income, which petitioners also did not report on the corporate income tax returns. Tr. 1430-1434, 1592-1594. For fiscal years 1982 through 1984, petitioners caused the first bookstore to underreport its total income by almost $200,000, and in those same years, the bookstore reported only $1,227.31 in income tax owed, when its actual income tax liability totaled $75,952.23. Tr. 1808-1810. Petitioners caused the second bookstore to underreport its income for fiscal years 1982 through 1984 by almost $70,000, and the second store reported that no tax was owed for 1982 and 1983, when in fact it owed $8,762.36 for those years. Tr. 1811-1812.

The evidence showed that petitioners used various methods to conceal the unreported receipts of the bookstores. They dealt largely in cash. In addition, they deposited large amounts of cash generated by the bookstores into corporate bank accounts, but they caused those deposits to be recorded on the corporate books as loans from shareholders rather than as income. Tr. 1537-1539, 1571-1579, 1644-1647.

Petitioners were also involved in a real estate and investment holding entity. Tr. 1513-1514. The indictment charged that petitioners were responsible for filing false tax returns for that entity, but petitioners were acquitted on all counts relating to those returns. Pet. App. 28.

2. Prior to sentencing, petitioners objected to the inclusion of information in their presentence investigation reports relating to the conduct as to which they had been acquitted. They argued that the district court could not consider the evidence that related to the counts on which they had been acquitted, because to do so would contravene the jury's verdict. Pet. App. 28, 40. The trial judge determined, however, that because the government had proved that conduct by a preponderance of the evidence, he could consider the evidence for purposes of sentencing. *Id.* at 43-44.

3. The court of appeals affirmed. The court rejected petitioners' argument that the district court had abused its discretion by considering, for purposes of sentencing, conduct for which they had been acquitted at trial. Pet. App. 28-31.

ARGUMENT

Petitioners maintain that the sentencing judge should not have considered conduct for which they had been acquitted at trial.

1. Before the Sentencing Guidelines became law, it was well settled that a district judge had broad discretion in imposing sentence within the statutory limits. *United States* v. *Tucker*, 404 U.S. 443, 446-447 (1972). Generally, a sentence within the statutory limits would not be disturbed unless it was "founded at least in part on misinformation of con-

stitutional magnitude." *Id.* at 447. This Court made clear that the sentencing judge could "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Id.* at 446.[1] Moreover, Congress has long provided that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661 (formerly 18 U.S.C. 3577 (1982)).

Applying those principles, the courts uniformly concluded before the Sentencing Guidelines went into effect that a sentencing court could consider evidence regarding a crime for which the defendant was never charged, tried, or convicted. *E.g.*, *United States* v. *Grayson*, 438 U.S. 41 (1978) (trial court may consider the defendant's perjury while testifying at trial); *Williams* v. *New York*, 337 U.S. 241, 244 (1949) (sentencing court considered defendant's prior criminal record, including 30 burglaries for which he had not been convicted, without allowing him to cross-examine witnesses on the subject). It was likewise well settled that the sentencing court could consider evidence regarding a crime for which the charges had been dismissed, *e.g.*, *United States*

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[1] A defendant's right to due process did (and still does) place limits on the degree to which a judge may rely on convictions obtained without the benefit of counsel or convictions based on materially false or unreliable information. See *United States* v. *Tucker*, *supra* (error to consider unconstitutionally obtained prior felony conviction); *Townsend* v. *Burke*, 334 U.S. 736, 740-741 (1948) (error to consider misinformation when uncounseled defendant had no opportunity to prevent court from being misled).

v. *Ortiz*, 742 F.2d 712, 714 n.3 (2d Cir.), cert. denied, 469 U.S. 1075 (1984); *United States* v. *Hansen*, 701 F.2d 1078, 1081 (2d Cir. 1983); *United States* v. *Needles*, 472 F.2d 652, 654-656 (2d Cir. 1973); *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965); evidence regarding a crime for which the defendant's conviction was later reversed on appeal, *e.g.*, *United States* v. *Atkins*, 480 F.2d 1223, 1224 (9th Cir. 1973); or evidence regarding a crime for which the defendant had been acquitted at trial, *e.g.*, *United States* v. *Funt*, 896 F.2d 1288, 1300 (11th Cir. 1990) ("an acquittal does not bar a sentencing court from considering the acquitted conduct in imposing sentence"); *United States* v. *Bernard*, 757 F.2d 1439, 1444 (4th Cir. 1985); *United States* v. *Cardi*, 519 F.2d 309, 314 n.3 (7th Cir. 1975); *United States* v. *Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972).

The Sentencing Guidelines embrace those principles. Section 6A1.3 of the Guidelines provides that a district court may consider any reliable evidence at sentencing. Sentencing Guidelines § 6A1.3.[2] If there is a question about the reliability of the information available to the court, the Sentencing Guidelines endorse the practice of conducting an evidentiary hearing to resolve that question. *Ibid.* See *United States* v. *Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). No Sentencing

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[2] Section 6A1.3 (Policy Statement) provides that:

> (a) * * * In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

Guideline provides that evidence is barred from consideration on the ground that it concerns an offense of which the defendant was acquitted.

In arguing that the sentencing court erred in considering the facts underlying the charges on which they were acquitted, petitioners have overlooked the fact that different standards of proof apply at the guilt and sentencing stages of a criminal prosecution. Although the beyond-a-reasonable-doubt standard applies to the resolution of the question of the defendant's factual guilt or innocence at the guilt stage of a criminal prosecution, *In re Winship*, 397 U.S. 358 (1970), the Constitution does not require that the government prove facts relevant to sentencing to that degree of certainty. The preponderance standard satisfies due process for sentencing purposes. *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). An acquittal does not prove that the defendant was "innocent" of the charged crime, or that he did not commit the charged acts. An acquittal establishes only that the government did not prove the defendant's guilt beyond a reasonable doubt. A jury's finding that the government did not prove the existence of a fact beyond a reasonable doubt does not bar the government from attempting to prove the existence of that fact under the lower, preponderance standard of proof. *Dowling* v. *United States*, 493 U.S. 342, 348-350 (1990).[3] Accordingly, given the different standards

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[3] Indeed, an acquittal does not "necessarily even reflect a failure of proof on the part of the prosecution." *United States* v. *Espinosa-Cerpa*, 630 F.2d 328, 332 & n.4 (5th Cir. 1980); *United States* v. *Price*, 750 F.2d 363, 365 (5th Cir.), cert. denied, 473 U.S. 904 (1985). Not guilty verdicts may result "from compromise, confusion, mistake, leniency or other legally and logically irrelevant factors." *United States* v.

of proof that apply at the two different stages of a criminal case, the Constitution does not bar a court at sentencing from finding facts that the jury rejected in the course of returning a not guilty verdict in an earlier prosecution. See, *e.g.*, *United States* v. *Moreno*, 933 F.2d 362, 374 (6th Cir. 1991); *United States* v. *Rodriguez-Gonzalez*, 899 F.2d 177, 180-182 (2d Cir.), cert. denied, 111 S. Ct. 127 (1990); *United States* v. *Sweig*, 454 F.2d at 184.

Petitioners have not offered a good reason for adopting a different rule. They contend that a verdict of acquittal does not reveal "which portions, if any, of the evidence were disbelieved by the jury" and that allowing the trial judge to accept evidence that might have been discredited by the jury diminishes the jury's role. Pet. 12. But in light of the different burdens of proof that apply at the guilt and sentencing stages of trial, the sentencing judge need not attempt to divine what the jury believed; instead, the judge may conduct his own independent review of the evidence to determine, under the lesser standard applicable to sentencing, whether the conduct underlying the acquittal occurred.

In this case, the district court properly considered all of the evidence presented at trial under the preponderance standard, Pet. App. 44-45, and concluded that petitioners had failed to report income on their individual and partnership returns. Tr. 2755-2756.[4]

Price, 750 F.2d at 365; *United States* v. *Espinosa-Cerpa*, 630 F.2d at 332. See also *United States* v. *Powell*, 469 U.S. 57, 63, 65-69 (1984); *Standefer* v. *United States*, 447 U.S. 10, 22-23 (1980); *Dunn* v. *United States*, 284 U.S. 390, 393-394 (1932).

[4] The trial judge said that he had taken copious notes of the proceedings. He noted that the evidence he would consider had been subject to cross-examination. The judge also noted

Petitioners had an opportunity on cross-examination to challenge the evidence produced by the government and to present their own version of the facts. Pet. App. 45. And the sentencing judge had the opportunity to observe the witnesses. Thus, the district court properly found that the information was accurate and reliable. Pet. App. 30.[5]

Contrary to petitioners' contention, Pet. 13-15, the decision below does not conflict with *Hughey* v. *United States*, 110 S. Ct. 1979 (1990). The question in *Hughey* was whether a district court had the authority under the restitution provisions of the Victim and Witness Protection Act of 1982, 18 U.S.C. 3579(a)(1) and 3580 (Supp. IV 1982), to require a defendant to make restitution for acts other than those underlying the offense of conviction. This Court held that by using the phrase "the amount of the loss sustained by any victim as a result of the offense," 18 U.S.C. 3579, Congress limited the amount of restitution to the loss resulting from the offense of conviction. 110 S. Ct. at 1983-1984. The Court reasoned that Congress's use of the phrase "the offense" referred to the offense of conviction and indicated that the amount of restitution should be tied to that offense. *Id.* at 1984. Unlike the Victim and Witness Protection Act of 1982, however, 18 U.S.C. 3661 manifests no legislative intent to restrict the evidence that a sentencing court may consider to the conduct underlying the offense of conviction. On the contrary,

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that he would consider evidence presented by the defense. Pet. App. 44-45.

[5] Indeed, facts adduced during trial may be more reliable than the hearsay evidence which courts may consider in determining an appropriate sentence. *United States* v. *Sweig*, 454 F.2d at 184.

that statute expresses Congress's intent that "[n]o limitation shall be placed" on the amount and type of information that a court may consider in devising an appropriate sentence.

2. Since the Sentencing Guidelines went into effect, nine courts of appeals (including the one below) have held that judges at sentencing may rely on evidence of a defendant's conduct relating to charges on which the defendant was acquitted at trial. *United States* v. *Mocciola*, 891 F.2d 13, 16-17 (1st Cir. 1989); *United States* v. *Rodriguez-Gonzalez*, 899 F.2d 177, 180-182 (2d Cir.), cert. denied, 111 S. Ct. 127 (1990); *United States* v. *Ryan*, 866 F.2d 604, 608-609 (3d Cir. 1989); *United States* v. *Isom*, 886 F.2d 736 (4th Cir. 1989); *United States* v. *Juarez-Ortega*, 866 F.2d 747, 749 (5th Cir. 1989); *United States* v. *Duncan*, 918 F.2d 647, 652 (6th Cir. 1990), cert. denied, 111 S. Ct. 2055 (1991); *United States* v. *Fonner*, 920 F.2d 1330, 1332-1333 (7th Cir. 1990); *United States* v. *Dawn*, 897 F.2d 1444, 1449-1450 (8th Cir.), cert. denied, 111 S. Ct. 389 (1990); *United States* v. *Averi*, 922 F.2d 765 (11th Cir. 1991). In *United States* v. *Brady*, 928 F.2d 844, 851-852 (9th Cir. 1991), however, the Ninth Circuit held that a judge may not depart upward from the Sentencing Guidelines range on the basis of a factual finding that the jury has necessarily rejected by its judgment of acquittal. The defendant in that case was acquitted of premeditated murder and assault with the intent to commit murder. He was convicted only of the lesser included offenses of voluntary manslaughter and assault with a deadly weapon. Over a dissent by Chief Judge Wallace, the panel majority held that the district court erred in finding that Brady acted with premeditation when the court sen-

tenced him for the offenses of conviction. In the majority's view, the question whether Brady acted with premeditation was resolved in his favor by the jury's verdict, and "[i]t would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted." 928 F.2d at 851.

Although the Ninth Circuit's decision in *Brady* conflicts with the circuit court decisions cited above, this case is not an appropriate vehicle for resolving that conflict. The Ninth Circuit's decision in *Brady* involved an interpretation of the Sentencing Guidelines. See 928 F.2d at 851-852 & n.14. In this case, by contrast, the Sentencing Guidelines did not apply, because the offenses at issue here were committed before November 1, 1987, the effective date of the Sentencing Guidelines. There is no conflict among the circuits as to whether courts under the pre-Guidelines sentencing system could consider conduct that was the subject of an acquittal, and in any event that issue is one of rapidly diminishing importance, since there are relatively few cases remaining in which district courts are imposing sentence under the pre-Guidelines regime. While we believe that the conflict among the circuits with respect to a sentencing court's reliance on conduct that was the subject of an acquittal may well justify this Court's review in an appropriate case, we believe that the appropriate case would be one in which sentence was imposed under the Sentencing Guidelines, as it was in the *Brady* case, which generated the circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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